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No. 93-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PETER BRANTON,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NATIONAL PUBLIC RADIO, PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that an individual does not have standing under Article III to seek judicial review of a Federal Communications Commission decision not to impose sanctions for allegedly "indecent" language in a radio news broadcast?

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BRIEF FOR RESPONDENTS NATIONAL PUBLIC RADIO, PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN OPPOSITION

This case presents the question whether a private individual has standing to obtain judicial review of a Federal Communications Commission decision not to sanction a broadcaster for an allegedly "indecent" program. As the Court of Appeals correctly concluded, because no imminent threat exists that such an individual will be exposed to "indecent" material on the same station in the future, the individual lacks standing to seek judicial review. That conclusion is consistent with this Court's precedents, and does not conflict with the decision of any other court of appeals.

This would have been a particularly inappropriate case in which to confer standing to challenge government action. Petitioner

does not claim that the Commission has deprived him of any benefit to which he might otherwise be entitled. He is, instead, merely seeking to have the Commission impose sanctions on third parties who five years ago produced and broadcast a radio news program that contained a supposedly "indecent" word. Moreover, petitioner has not claimed to be a regular listener of the station or the program that was the subject of his complaint. Nor has he asserted an interest as a parent in shielding a young child from "indecent" material. His claim to standing to challenge the Commission's action is plainly too insubstantial to warrant this Court's attention.

STATEMENT OF THE CASE

National Public Radio produces an acclaimed news magazine program, *All Things Considered*, which is broadcast on its member stations during the early evening hours. On February 8, 1989, *All Things Considered* presented a report on John Gotti, the leader of an organized crime family in New York. Pet. App. 2a, 15A. The Gotti report was prefaced by a warning that "the following story contains some very rough language." *Id.* at 17a.

The report opened by describing Gotti as "the nation's most notorious gangster" and noting his acquittal in two celebrated trials. Pet. App. 17a. The report included comments from the head of the Justice Department's Organized Crime Strike Force in Brooklyn, a detective in the Queens District Attorney's Office and the author of a book about Gotti.

The report concluded with an excerpt from a wiretap, which had previously been played in court, of a telephone conversation in which Gotti threatened one of his associates. Pet App. 18a-19a, A second warning that "Gotti's threats are extremely profane" preceded the wiretap excerpt. *Id.* at 18a. According to the Court of Appeals' calculations, "[i]n the 110-word passage that NPR excerpted from the tape recording for broadcast, Gotti used variations of 'the f--- word' ten times," including "to modify virtually every noun and in one instance even a verb." *Id.* at 2a.

Petitioner Peter Branton heard the Gotti report on WSMC-FM,

a Collegedale, Tennessee radio station, at approximately 6:25 p.m. on February 8, 1989. Pet. App. 15a. Three months later, he filed a complaint with the Commission's Mass Media Bureau, contending that the language in the wiretap was obscene and indecent under 18 U.S.C. § 1464 (1988).[1]

On October 26, 1989, the Mass Media Bureau dismissed Branton's complaint on the ground that the broadcast was neither obscene nor indecent. Pet. App. 15a. Branton sought review of the Mass Media Bureau's decision, in order to have the full Commission impose a forfeiture.[2]

On January 25, 1991, the Commission affirmed the Mass Media Bureau's conclusion that the Gotti report did not come within the Commission's definition of "indecency" -- *i.e.*, that the material did not "'describe[] in terms patently offensive as measured by contemporary community standards for the broadcast

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[1] The constitutional implications of the Commission's regulation of broadcast indecency under 18 U.S.C. § 1464 have previously been considered by this Court and the Court of Appeals. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, 1282 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, No. 93-1082, (D.C. Cir. rehearing en banc granted Feb. 16, 1994) ("*ACT III*"). The Court of Appeals' post-*Pacifica* cases have upheld the Commission's "indecency" definition against vagueness and overbreadth challenges. At the same time, however, the court has held that the government is barred by the First Amendment from imposing a 24-hour-a-day ban on broadcasts that the Commission might deem "indecent." The precise scope of the safe harbor that must be provided for such material is currently being litigated.

[2] If the Commission finds that broadcast material is actionably indecent -- *i.e.*, that the material comes within its indecency definition and was broadcast outside any existing safe harbor period -- the Commission ordinarily imposes a monetary forfeiture. *See* 47 U.S.C. § 503(b) (1988). These forfeitures have ranged from several thousand dollars to several hundred thousand dollars in recent cases.

medium, sexual or excretory activities or organs.'" Pet. App. 15a-16a (quoting *Infinity Broadcasting Corp.*, 3 F.C.C.R. 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988)). The Commission emphasized the importance of "context" in its determinations of whether material is "indecent." Pet. App. 16a. The Commission then concluded that the "context" of the Gotti wiretap -- which was "an integral part of a *bona fide* news story concerning organized crime" and which itself "was evidence used in a widely reported trial" -- precluded a finding of indecency. *Id.* at 16a. One Commissioner dissented. *Id.* at 19a-21a.

Branton filed a petition for review of the Commission's decision in the Court of Appeals for the District of Columbia Circuit. The Court permitted these respondents to intervene in support of the Commission's decision.

These respondents explained to the Court of Appeals that the dismissal of Branton's complaint not only was consistent with the Commission's practice, but also was constitutionally compelled. First, these respondents joined the Commission in arguing that the Gotti report, including the wiretap conversation, was not "indecent" under the Commission's own definition, given the emphasis that the Commission places on "context" in its indecency determinations.[3] It was thus appropriate for the Commission to take into account the context of the wiretap conversation as "an integral part of a *bona fide* news story on organized crime," as presenting "evidence used in a widely reported trial," and as not involving the "gratuitous, pandering, titillating or otherwise 'patently offensive'" use of "coarse words." Pet. App. 16a.

In addition, these respondents argued that the Commission could not, consistent with the First Amendment, impose sanctions

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[3] Respondents noted, however, that the Commission's "indecency" definition is far from satisfactory. Indeed, these respondents, and others, have urged elsewhere that the definition is unconstitutionally vague. *See, e.g., ACT I*, 852 F.2d at 1338-39.

for "coarse words" used in an evening news program with no appreciable child audience.[4] As respondents explained, the First Amendment prevents the Commission from "intrud[ing] unnecessarily upon the editorial discretion of broadcasters," especially with respect to material, such as news and commentary on public issues, that "lies at the heart of First Amendment protection." *FCC v. League of Women Voters*, 468 U.S. 364, 379, 381 (1984); *accord CBS Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 123-25 (1973). Accordingly, while the Commission may regulate indecency to serve an important or "compelling" interest, such as assisting parents in supervising their children's viewing and listening, any indecency regulation that reached an evening news broadcast heard almost exclusively by adults would not be sufficiently "narrowly tailored" to pass constitutional muster. *League of Women Voters*, 468 U.S. at 380; *see Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989).[5]

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[4] Respondents pointed out that National Public Radio member stations attract no appreciable audience of children or teenagers for their evening programming. For example, the Commission had previously noted that "according to the Arbitron National Report (Spring 1989), member stations carrying NPR programming have *no* measurable audience in the [12-17] age group from . . . 6 p.m. to 6 a.m." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297, 5303 (1990), *vacated and remanded sub nom. ACT II*, 932 F.2d 1504. As the Commission observed, no data are routinely collected as to the listening habits of children under 12. 5 F.C.C.R. at 5302.

[5] Respondents noted the Court of Appeals' earlier holding that the Commission may regulate non-obscene "indecent" broadcasts only through "carefully-tailored regulation" that "give[s] effect to the government's interest in promoting parental supervision of children's listening, without intruding excessively upon the licensee's range of discretion or the fare available for mature audiences." *ACT I*, 852 F.2d at 1343 n.18, 1344 (R.B. Ginsburg, J.); *accord ACT II*, 932 F.2d at 1508-09.

On June 1, 1993, the Court of Appeals dismissed Branton's petition for review on Article III standing grounds. The court held that Branton could not establish the "'real and immediate threat of injury'" necessary to permit a litigant to challenge the government's decision not to regulate or prosecute others. Pet. App. 4a (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)). The court explained that, "[w]hile there is, of course, some chance that somewhere, at some time, the petitioner may again be exposed to a broadcast indecency as a result of the Commission's decision, that possibility seems to us far too remote and attenuated to establish a case or controversy under Article III." *Id.* at 6a. In addition, the court held that Branton likewise could not satisfy the "causation" and "redressability" requirements of Article III standing. *Id.* at 7a-10a.

On September 30, 1993, the Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc filed by two other intervenors in the case. Pet. App. 13a.

REASONS FOR DENYING THE PETITION

The Court of Appeals' conclusion that Branton cannot establish a "real and immediate threat of injury" sufficient to confer standing under Article III is correct under this Court's precedents. It does not conflict with any decision of this Court or of any other court of appeals.

1. The Court of Appeals' decision involves nothing more than an application of the standing requirements articulated in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), and *Los Angeles v. Lyons*, 461 U.S. 95 (1983), in the particular context of broadcast indecency regulation. Accordingly, review by this Court is not warranted.

This Court reiterated just two years ago that "the irreducible constitutional minimum of standing" requires, *inter alia*, that the plaintiff demonstrate an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Lujan*, 112 S. Ct. at 2136 (internal quotations omitted); *accord Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lyons*, 461 U.S. at 102. The Court

explained that such an injury becomes especially difficult to establish where, as in this case, *Lujan* and *Lyons*, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan*, 112 S. Ct. at 2137. It is not enough in these circumstances for the plaintiff to claim to have been injured by the "someone else" at some time in the past; instead, the plaintiff must demonstrate a "real and immediate threat of injury" in the future should the government continue to act in an allegedly unlawful manner. *Lyons*, 461 U.S. at 103; *accord Lujan*, 112 S. Ct. at 2138. And because "the acts necessary to make [such an] injury happen are at least partly within the plaintiff's own control" or in the control of third parties, the Court has "insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan*, 112 S. Ct. at 2139 n.2.

Branton does not appear to dispute that he must establish some "injury in fact" in order to have standing to seek judicial review of the Commission's dismissal of his complaint. *See* Pet. 7, 14. He merely disputes the Court of Appeals' conclusion that he could not establish the requisite "real and immediate threat of injury" in the circumstances of this case. But the court below was surely correct that "[i]t is mere conjecture that a radio station will again broadcast, at a time when the petitioner is listening, indecencies that would be proscribed under 18 U.S.C. § 1464 (as he would have us interpret that statute)." Pet. App. 5a-6a. The Court of Appeals' case-specific application of the "injury in fact" requirement does not merit this Court's attention.[6]

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[6] As Branton acknowledges (Pet. 9 n.4), "agency standing and Article III standing need not be governed by the same test." Nothing in the Court of Appeals' decision prevents the Commission from continuing, as it does today, to receive and decide viewers' and listeners' indecency complaints in advance of a license-renewal proceeding. There is thus no reason to accept Branton's claim that a broadcaster who is the subject of a complaint will, as a result of the decision below, "get[] no intermediate relief, no warning, and no opportunity to conform its

That the Commission is required to regulate the airwaves in "the public interest" with due regard for "the right[s] of viewers and listeners" does not, as Branton contends (Pet. 9, 12), mean that viewers and listeners have standing to challenge any regulation (or non-regulation) of the airwaves with which they disagree. All criminal and regulatory statutes are, of course, designed to promote "the public interest." But that does not automatically confer standing on any member of the public to sue in federal court over the government's decision whether or not to enforce those statutes against third parties. It remains necessary to demonstrate some "real and immediate threat of injury" to the very party seeking to challenge the government's enforcement activity. *See Lujan*, 112 S. Ct. at 2137 ("'[T]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.'") (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)). The Court of Appeals correctly concluded that the "injury in fact" requirement was not satisfied here.[7]

The correctness of the Court of Appeals' conclusion is especially clear in the circumstances of this case. Branton has not claimed to be a regular listener of WSMC-FM, the station on which he heard the Gotti report, or of any other station that broadcasts National Public Radio programs. Indeed, he has not claimed to have been exposed to allegedly "indecent" speech on

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broadcasts to the FCC's rules except in a proceeding to grant or deny its license renewal." Pet. 17-18.

[7] Contrary to Branton's suggestion (Pet. 8-9), *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), had nothing to do with listener standing in the courts. It was the broadcaster who was the subject of the indecency complaint in *Pacifica* -- *not* the complaining listener -- who sought judicial review of the Commission's order sustaining the complaint. *See Pacifica Foundation v. FCC*, 556 F.2d 9, 10 (D.C. Cir. 1977). It was likewise the broadcaster who was the subject of the fairness complaint in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), who sought judicial review in the court of appeals and in this Court. *See id.* at 372-73 & n.3.

any radio station on any other occasion. Nor has Branton claimed an interest as a parent in deterring the presentation of "indecent" material on a program heard by his child.[8] An individual's standing to challenge the Commission's dismissal of an indecency complaint is particularly insubstantial where, as here, he is neither a regular listener of the station or program at issue nor a parent seeking the government's assistance in shielding his child from indecent material.[9]

2. The decision below does not conflict with the decision of any other court of appeals. Neither of the cases from other Circuits on which Branton purports to rely -- both of which

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[8] As the District of Columbia Circuit recognized in *ACT I*, the Commission's sole interest in regulating "indecent" broadcasts is to "facilitate parental supervision of children's listening." 852 F.2d at 1343; *accord ACT II*, 932 F.2d at 1508-09.

[9] These respondents take no position on the correctness of the Court of Appeals' conclusion that standing must also be denied based on the absence of "causation" and "redressability." Nor is it necessary for this Court to consider this alternative ground for decision, given that standing was correctly found wanting based on the absence of an "injury in fact."

These respondents do not, however, concur in all aspects of the lower court's "causation/redressability" analysis. For example, respondents disagree with the suggestion that broadcasters' programming decisions may not be affected by the threat of FCC indecency sanctions. Pet. App. 9a-10a. The court failed to appreciate the potentially dire consequences to a broadcaster of presenting material that the Commission may deem to be "indecent," which include not only substantial fines, but also denial of approval to acquire new stations and permanent loss of its license. Nor do respondents accept the court's suggestion that public broadcasters and program production organizations, such as National Public Radio, may be peculiarly indifferent to indecency sanctions. *Id.* at 9a. Public broadcasters, at least as much as commercial broadcasters, cannot afford to incur fines, to jeopardize their licenses or to offend their listeners and viewers. National Public Radio would not want to provide its member stations with programs that might cause such consequences.

predate *Lujan* -- concerned standing to appeal the dismissal of an indecency complaint. In fact, respondents are aware of no other reported case in any court in which the Commission's dismissal of such a complaint has been challenged.

The cases advanced by Branton instead involve challenges to other sorts of Commission actions that have more direct and immediate consequences for the viewer or listener. *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984), held that a listener could appeal the Commission's dismissal of a complaint under the then-extant fairness doctrine, which required broadcasters to present conflicting points of view on controversial issues. And *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975), ultimately concluded that an organization representing cable television viewers did *not* have standing to challenge the Commission's refusal to impose common carrier obligations on cable access channels.

The Commission's decisions in *Maier* and *ACLU* cannot be analogized for standing purposes to the Commission's dismissal of the indecency complaint in this case, because a viewer's or listener's injury as a result of adverse Commission action is quite different in these other contexts than in the indecency context. For example, if a broadcaster were found to have violated the now-repealed fairness doctrine, the Commission would have ordered the broadcaster to provide air time for the previously unrepresented viewpoint. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 660-61 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). A listener whose fairness complaint was dismissed would thus lose the opportunity to receive programming on that station presenting the opposing side of a controversial issue. That loss would arguably be "real and imminent" enough to satisfy the "injury in fact" component of Article III standing, as the District of Columbia Circuit's own decisions involving standing to pursue

fairness complaints implicitly recognize.[10]

A listener suffers no comparable loss, however, when the Commission dismisses his indecency complaint. If a broadcaster is found to have committed an indecency violation, the Commission may order a monetary forfeiture or other sanctions. But the Commission does not impose any prospective programming obligation on the broadcaster. Accordingly, when an indecency complaint is dismissed, the listener is not, as in the fairness context, deprived of any opportunity to receive particular programming. The Court of Appeals' decision that individuals do not have standing to challenge the Commission's dismissal of indecency complaints cannot, therefore, be said to conflict with other courts' decisions that individuals have standing to challenge different Commission actions that could cause them some "real and immediate" injury.

3. The expansive approach to viewer and listener standing urged by Branton could impose a new and undue burden on the Commission, broadcasters and the courts.

The Commission receives a number of indecency complaints each year that are ultimately dismissed. At times, the Commission has been deluged with such complaints as a result of the concerted efforts of advocacy groups. The volume of

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[10] For example, in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), the court held that viewers had standing to challenge the Commission's renewal of the license of a broadcaster who had failed to fairly present the black perspective on civil rights. The Commission's action thus deprived viewers of the imminent opportunity to receive the programming of a new licensee who could be expected to provide more extensive and balanced civil-rights coverage. Similarly, in *Llerandi v. FCC*, 863 F.2d 79 (D.C. Cir. 1988), listeners were recognized to have standing to challenge the Commission's approval of the transfer of two radio licenses to members of the same family -- an action that deprived listeners of the opportunity to obtain greater "diversification of viewpoints" on radio stations within a single broadcast area. *Id.* at 85.

indecency complaints might well increase if complainants were assured of a judicial forum in which to press their causes. A significant strain would be placed on the time and resources of the Commission, broadcasters and the courts if judicial review were sought in even a portion of the indecency cases dismissed by the Commission.

It cannot be assumed that these cases would proceed through the courts any more expeditiously or economically than this case, which was pending in the Court of Appeals for nearly three years and which demanded considerable attention from the court and the parties. These cases would be complicated by the fact that, as the Court of Appeals has recognized, "vagueness is inherent" in the Commission's definition of broadcast indecency. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (R.B. Ginsburg, J.) ("*ACT I*"). And the safe harbor hours for the broadcast of material that the Commission might deem "indecent" have changed frequently in recent years as a result of congressional and Commission action. *See Action for Children's Television v. FCC*, No. 93-1082, (D.C. Cir. rehearing en banc granted Feb. 16, 1994); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, 1282 (1992); *ACT I*, 852 F.2d 1332. The courts would thus face the difficult task of assessing the Commission's compliance with standards that are both obscure and constantly shifting.

The standing rule urged by Branton would also produce the anomaly that, while viewers and listeners could seek immediate judicial review of Commission orders *dismissing* indecency complaints, broadcasters could not similarly seek judicial review of Commission orders *sustaining* indecency complaints. A Commission order imposing indecency sanctions cannot be immediately challenged by the broadcaster in the district courts or the courts of appeals, but may be challenged only when the United States eventually commences a collection action. *See* 47 U.S.C. § 504(a) (1988); *Pleasant Broadcasting Co. v. FCC*, 564

F.2d 496, 501-03 (D.C. Cir. 1977).[11] It would turn standing doctrine on its head to afford viewers and listeners, who face no "real and immediate threat of injury" from adverse Commission action dismissing an indecency complaint,[12] a greater right to judicial review than broadcasters, who plainly do face such a threat from adverse Commission action imposing monetary forfeitures or other sanctions for "indecent" programming.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[11] *See also Action for Children's Television v. FCC*, 827 F. Supp. 4, 7-8 (D.D.C. 1993) (recognizing that immediate review is unavailable), *appeal pending*, No. 93-5278 (D.C. Cir.).

[12] Congress has not, of course, enacted legislation under 18 U.S.C. § 1464 purporting to "elevat[e]" the dismissal of viewers' and listeners' indecency complaints "to the status of legally cognizable injuries." *Lujan*, 112 S. Ct. at 2145.

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